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Supreme Court, U.S.
FILED

MAR 3 2003

No. 02-662

In The
Supreme Court of the United States

JOHN EDWARD FISHER,

Petitioner,

v.

MARK HART,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

In *Farmer v. Brennan*, 511 U.S. 825 (1994), the Court declared that prison officials who have actual knowledge of a substantial threat to inmate safety must respond "reasonably" to that threat. This "reasonable response" test has engendered confusion and conflict in the courts regarding the test's jurisprudential basis and proper application. Respondent Mark Hart sidesteps these important issues and presents a misleading view of relevant Eighth Amendment failure-to-protect precedent.

Rather than carefully analyzing the case law, Hart recasts *Farmer*'s language into an unbounded "facts and circumstances" approach that veils both the doctrinal complexity of *Farmer*'s reasonable-response test and the difficulty that the circuits have had in applying that test consistently. That inconsistency is apparent in the Ninth Circuit's conclusion that Hart responded reasonably as a matter of law despite the inadequacy of his misleading gestures that not only failed to protect Fisher from retaliation but also rendered him more vulnerable to attack. Notwithstanding Hart's contention that a single disputed fact renders this case inappropriate for certiorari, the undisputed record affords an opportunity for the Court to clarify the meaning and proper application of the reasonable-response test. This Court should grant Fisher's Petition to provide needed guidance to prison officials, litigants, and the courts regarding the duties a prison official must fulfill upon identifying a substantial threat to an inmate's safety.

A. Hart's Mischaracterization of the *Farmer v. Brennan* "Reasonable Response" Test Masks the Substantial Uncertainty Surrounding that Test.

Hart dramatically oversimplifies *Farmer*'s reasonable-response test and fails to address a key argument in Fisher's Petition: that the *Farmer* Court left open both the

jurisprudential basis of the reasonable-response test and the analysis to be employed once a plaintiff establishes that a prison official had actual knowledge of a substantial threat to an inmate's safety.

1. The *Farmer* Reasonable-Response Test Is Not Limited to an Analysis of "Facts and Circumstances."

Farmer established a subjective state-of-mind requirement for determining whether prison officials knew of a substantial threat to inmate safety. *See* 511 U.S. at 838. Hart erroneously contends that *Farmer* announced a "holding" that "[w]hether prison officials responded reasonably must obviously be evaluated in light of the underlying circumstances," and he mischaracterizes *Farmer* as merely calling for an analysis of "the attendant circumstances" and "the particular facts and circumstances" of each case. Opp. at 4.

Farmer does not bear out these assertions. After establishing the state-of-mind requirement, *Farmer* briefly described a reasonable-response test, but did not apply that newly announced test to the facts. *See Farmer*, 511 U.S. at 844-45. Moreover, *Farmer* declined to specify the doctrinal basis for the reasonable response test: "Whether one puts it in terms of duty or deliberate indifference, prison officials who act reasonably cannot be found liable under the Cruel and Unusual Punishments Clause." *Id.* at 845.

In light of the uncertainty expressed by *Farmer*, Hart's characterization of *Farmer*'s reasonable-response test as "well-developed" is misleading. Fisher's Petition presents crucial questions that this Court has never addressed: when, as in Fisher's case, a prison official is shown to have had subjective knowledge of a substantial threat to inmate safety, does *Farmer* create a duty to respond to that threat in a reasonable manner; and by

what standard or rule is the official's response to be judged?

2. The Confusion and Conflict in Eighth Amendment Cases Demonstrate the Need for Clarification of the *Farmer* Reasonable-Response Test.

The circuits' attempts to define the parameters of *Farmer*'s reasonable-response test also illustrate the uncertainty surrounding that test. The courts of appeals have repeatedly pointed out that *Farmer* did not thoroughly address the duties incumbent on prison officials who are shown to have the requisite knowledge of a substantial threat. *See* Pet. at 7.

This lingering uncertainty has manifested itself in two ways. First, courts are uncertain whether *Farmer*'s reasonable-response test is a secondary inquiry to be applied once a plaintiff establishes that the prison official knew of a substantial threat to inmate safety (*i.e.*, a residual duty), or rather an inseparable part of the overall deliberate-indifference test. For example, in *Gibbs v. Franklin*, the Seventh Circuit determined that *Farmer* had not established any new tests beyond the subjective state-of-mind requirement:

> [Plaintiff] reads into the Supreme Court's opinion in *Farmer* a holding that a prison guard's response to actual knowledge of an impending attack must be judged against a standard of objective reasonableness. However, *Farmer* did not squarely address the question of a prison guard's duties or obligations toward an inmate.

49 F.3d 1206, 1208 (7th Cir. 1995), *called into question on other grounds*, *Haley v. Gross*, 86 F.3d 630, 641 (7th Cir. 1996).

In contrast, the Eighth Circuit held that *Farmer* created an affirmative duty: "[T]his duty requires prison officials to take reasonable measures to abate substantial

risks of serious harm, of which the officials are aware." *Reece v. Groose*, 60 F.3d 487, 491 (8th Cir. 1995).

The Second Circuit has treated the reasonable-response test as a component of *Farmer*'s state-of-mind assessment:

> The second prong of the deliberate indifference test, culpable intent, in turn, involves a two-tier inquiry. Specifically, a prison official has sufficient culpable intent if he has knowledge that an inmate faces a substantial risk of serious harm and he disregards that risk by failing to take reasonable measures to abate the harm.

Hayes v. N.Y. City Dep't of Corr., 84 F.3d 614, 620 (2d Cir. 1996).

Still other circuits have declined to reach any conclusions about the appropriate framework: "While the Court left open the question of whether the 'reasonable response' prong of *Farmer* is part of the state of mind requirement or whether it instead stems from the duty to 'ensure reasonable safety,' ... this prong nonetheless protects officials who act reasonably in response to a known risk." *Brown v. Harris*, 240 F.3d 383, 389 (4th Cir. 2001) (internal citations omitted). As these examples illustrate, there is significant confusion and conflict among the circuits regarding the doctrinal basis of *Farmer*'s reasonable-response test.[1]

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[1] *Farmer* in part based its definition of "deliberate indifference" on the definition of "criminal recklessness" in the American Law Institute's MODEL PENAL CODE § 2.02(2)(c). *See* 511 U.S. at 837. The Court's use of this definition may suggest another plausible interpretation of the reasonable-response test: that the "reasonableness" of the prison official's response to a known threat is actually a form of proof that the official possessed a sufficiently culpable state of mind. *See* Marjorie Rifkin, Farmer v. Brennan: *Spotlight on an Obvious Risk of Rape in a Hidden World*, 26 COLUM. HUM. RTS. L. REV. 273, 292 (1995) (noting that under MPC definition of recklessness, actor's culpable state of

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Second, for those courts that analyze the reasonable-response test as a duty arising from an official's knowledge of a threat, it is not clear by which standard or rule an official's conduct must be judged. *Farmer* established that the *mens rea* of deliberate indifference is a step beyond mere negligence; *Farmer* did not explain, however, whether the subsequent reasonable-response test incorporates a negligence standard.

Some courts have held that deliberate indifference differs from negligence primarily in that "constructive" or "objective" knowledge will suffice for the latter but not the former. *See Luttrell v. Nickel*, 129 F.3d 933, 936 (7th Cir. 1997); *Langston v. Peters*, 100 F.3d 1235, 1238 (7th Cir. 1996). Other courts have acknowledged *Farmer*'s use of the term "reasonable" but repudiated any association between the reasonable-response test and negligence: "the duty to act reasonably is a negligence standard, and *Farmer* stands for the broad proposition that deliberate indifference includes something more than negligence but less than actual intent to harm." *Newman v. Holmes*, 122 F.3d 650, 653 (8th Cir. 1997). Thus, while it is uncontroverted that the state-of-mind requirement of deliberate indifference is more demanding than common law negligence, the standard invoked by *Farmer*'s secondary "reasonableness" test remains uncertain. *See* Marjorie Rifkin, Farmer v. Brennan: *Spotlight on an Obvious Risk of Rape in a Hidden World*, 26 COLUM. HUM. RTS. L. REV. 273, 303 (1995) ("[Under *Farmer*, the] measure for determining the 'reasonableness' of defendants' actions remains ambiguous."). A careful reading of relevant Eighth Amendment precedent belies Hart's assurances that *Farmer* created a doctrinally consistent "facts and circumstances" test with which lower courts have had little difficulty.

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mind may be established by evidence of "the actor's conduct in the face of the risk").

B. Hart Attempts to Reconcile a Circuit Split by Recasting the Reasonable-Response Test as a Generalized "Facts and Circumstances" Test.

The practical effect of this analytical confusion is the circuits' inability to apply *Farmer*'s reasonable-response test consistently. Hart's re-invention of the *Farmer* holding as a generic "facts and circumstances" test artificially conceals the split among the circuits. Hart argues that because the courts "[took] into account the facts and circumstances," there is no conflict. In fact, Fisher does not argue that courts are merely failing to analyze the facts and relevant law. Rather, his Petition demonstrates that in many cases when an official's response to a known risk is minimal or even counterproductive, some circuits have failed to give meaning to the word "reasonable" as it is used in *Farmer*.

By arguing that the Fourth, Seventh, and Ninth Circuits applied the *Farmer* reasonable-response test in exactly the same manner as the First, Second, Third, and Eighth Circuits, Hart again substitutes generalization for careful analysis. Opp. at 4-6. Hart first argues that the Ninth Circuit's one-sentence conclusion that Hart responded reasonably as a matter of law is "unsurprising, given that it issued a memorandum decision,"[2] Opp. at 5,

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[2] To the extent that Hart argues that the unpublished nature of the *Fisher* decision diminishes any potential circuit split, he ignores precedent. This Court has not been reluctant to grant certiorari in unpublished cases to address circuit splits. *See, e.g., Eastern Assoc. Coal Corp. v. United Mine Workers of Am.*, 531 U.S. 57 (2000); *Carter v. U.S.*, 530 U.S. 255 (2000); *Johnson v. U.S.*, 529 U.S. 694 (2000); *Lynce v. Mathis*, 519 U.S. 433 (1997). *Farmer* itself involved a summary affirmance by the Seventh Circuit without opinion. *See Farmer v. Brennan*, 11 F.3d 668 (7th Cir. 1992), *vacated by* 511 U.S. 825 (1994). In addition, the mere fact of non-publication does not militate against a grant of certiorari. *See, e.g., C.I.R. v. McCoy*, 484 U.S. 3, 7 (1987) (per curiam) ("[T]he fact that the Court of Appeal's order under challenge here is unpublished carries no weight in our decision to review the case."); *see*

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but does not attempt to reconcile the court's terse holding with the reasonable-response test in *Farmer*. Here, the Ninth Circuit ruled that Hart's decisions to expose Fisher as the informant while leaving the next day's attacker in the same unit and to completely disregard established procedures for eliminating the threat constituted a reasonable response as a matter of law. That decision does not comport with either *Farmer* or the approach espoused by the First, Second, Third, and Eighth Circuits.

Hart's analysis of the decisions from the Seventh and Fourth Circuits is similarly unpersuasive. Hart characterizes the *Lewis v. Richards* holding as relying solely on the prison officials' ignorance of the risk. Opp. at 5. However, the *Lewis* court explicitly credited the inmate's version of the facts (as required on summary judgment) by assuming "that the defendants were aware of the fact that Lewis needed protection." 107 F.3d 549, 554 (7th Cir. 1997). The court nonetheless ruled that "[h]ad the defendants in this case simply refused to do anything, Lewis' case might survive summary judgment." *Id.* at 553. Moreover, Hart disregards the portions of Judge Flaum's concurring opinion that identify the incongruence in the *Lewis* majority's approach and explain that "[m]inimal gestures in response to known risks will not absolve prison officials of liability." *Id.* at 557 (Flaum, J., concurring).

Next, Hart argues circuitously – and circularly – that because the Fourth Circuit in *Brown v. Harris* "laid out the facts and law in painstaking detail" and performed its analysis "in extended detail in light of those facts and circumstances," the court gave meaning to the *Farmer* reasonableness requirement. Opp. at 6. This argument

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also Smith v. U.S., 502 U.S. 1017, 1020 (1991) ("Nonpublication must not be a convenient means to prevent review. An unpublished opinion may have a lingering effect in the Circuit and surely is as important to the parties concerned as is a published opinion.") (Blackmun, O'Connor, & Souter, J.J., dissenting from denial of certiorari).

does not challenge Fisher's contention that the Fourth Circuit twisted *Farmer*'s "reasonable response" test into an "any response" test. Indeed, the *Brown* court noted that the prison official "took less action than he could have, and by his own admission, should have," but nonetheless concluded that the official's response was reasonable as a matter of law. 240 F.3d at 390-91.

Rather than respond to Fisher's argument that courts have misinterpreted *Farmer* to require merely "any response" or a "minimal response" to known threats, Hart conceives an all-encompassing "facts and circumstances" test that, by its generality and abstraction, could shroud circuit splits on nearly any constitutional issue.

C. Fisher's Petition Addresses the Need for Clarification of the *Farmer* Reasonable-Response Test – Not Whether the Ninth Circuit Properly Applied Summary Judgment Standards.

Finally, Hart asserts inaccurately that Fisher's sole argument is that the Ninth Circuit improperly weighed evidence at the summary judgment stage. In doing so, Hart focuses exclusively on Fisher and Hart's conflicting versions of the alleged offer to move Fisher. Opp. at 7-10. Fisher *does* argue that the Ninth Circuit improperly affirmed the district court's grant of summary judgment, but not merely because the court credited Hart's testimony regarding the offer to move.[3] In affirming summary judgment, the Ninth Circuit

[3] Hart's use of Fisher's briefing before the Ninth Circuit does not prove otherwise. Fisher's arguments in that forum were consistent with that court's role: a *de novo* review of the district court's grant of summary judgment. Fisher's petition to this Court, in contrast, addresses an issue raised by the Ninth Circuit's flawed analysis: whether this Court's opinion in *Farmer* is in need of clarification with regard to the type of response required once an official is shown to have the requisite state of mind.

(like the Fourth and Seventh Circuits) applied a standard that absolves prison officials who know of a substantial risk to inmate safety even if they take no reasonable measures to prevent it. Regardless of whether Hart made any offer, his inadequate gestures both failed to protect Fisher from violent retaliation and increased the risk that such retaliation would occur. Hart tested both inmates and returned them to Fisher's unit without any warning to Fisher – in the process disregarding an easily implemented procedure that required Hart to segregate Fisher. Pet. at 14-15.

Fisher's Petition concerns far more than the Ninth Circuit's inadequate review of a particular summary judgment. It asks this Court to clarify for future cases the meaning and proper application of *Farmer*'s reasonable-response requirement and thereby mitigate the confusion and conflict now occurring in the courts. That confusion and conflict is fostering a form of immunity for prison officials from liability for serious injuries and deaths caused by uncontrolled prisoner violence. As Judge Lay admonished in this case, the brutality of inmate violence "will never be deterred when courts continuously provide a protective immunity to prison officials under factual records such as we confront here." Pet. at 5.

CONCLUSION

For the foregoing reasons, Petitioner John Edward Fisher respectfully requests that this Court grant his petition for certiorari.

Dated: February 27, 2003

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